SUPREME COURT, U. S.

FILED

No. 1267

In the Supreme Court of the United States

OCTOBER TERM, 1967

FRANK MILLARD BENSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,

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FRANK MILLARD BENSON, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In a jury trial in the United States District Court for the Eastern District of Tennessee, petitioner was found guilty on count 3 of an indictment charging him with knowingly storing a stolen motor vehicle which had been moving as a part of interstate commerce, in violation of 18 U.S.C. 2313 (R. 1; Tr. 372).[1] On March 21, 1967, he was sentenced to imprisonment for 18 months, to be eligible for parole at such time

[1] "Tr." refers to the transcript of the trial testimony.

as the Board of Parole may determine, as authorized by 18 U.S.C. 4208(a)(2) (R. 31). The court of appeals affirmed the conviction (Pet. App. A).

Since the sufficiency of the evidence is not challenged, the pertinent evidence may be stated briefly. One Smith testified for the government that petitioner bought the stolen Ford automobile from him for $1,200, and that petitioner knew the car had been stolen (Tr. 88-90). Petitioner, on the other hand, testified that he had obtained the automobile from one Badger, as security for a $50 loan he made to Badger (Tr. 225-227, 249-250).

In prior trials under the same indictment, petitioner had been represented by an attorney named Simpson, who later became an Assistant United States Attorney and occupied that position at the time of the present trial. On direct examination petitioner testified that he and Mr. Simpson had flown to Nashville, Tennessee, in an effort to locate Badger, but were unable to find him or to obtain any leads as to his whereabouts (Tr. 234-235). On cross-examination when petitioner was asked if he had not fired his attorney, his answer was "No." Petitioner explained that on the previous appeal it was his understanding that Mr. Friar (petitioner's attorney on the present appeal) and Mr. Simpson were working on the case together (Tr. 255-256).

In his closing argument to the jury, government counsel made the following statement, to which no defense objection was entered (Transcript of jury argument, p. 16):

> * * * I'd like to have had Mr. Simpson here. Mr. Simpson is, unfortunately can't get here and I—I see he is here now. If I had known he could have told us. I would like to put him on the stand and testify right now but I can't do that, it's too late.

Petitioner contends that this statement by government counsel was so inflammatory and prejudicial that it should be deemed plain error under Rule 52 (b), F. R. Crim. P. Counsel's remarks were admittedly improper since Simpson had not been called.[2] However, they cannot serve as a basis for reversal since they did not prejudice petitioner's substantial rights, and the other evidence disclosed a strong case against him. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 237-240; *United States* v. *Aadal*, 368 F.2d 962, 965 (C.A. 2), certiorari denied, 386 U.S. 970; *United States* v. *Donovan*, 339 F.2d 404, 410-411 (C.A. 7), certiorari denied, 380 U.S. 975; *Isaacs* v. *United States*, 301 F.2d 706, 735-739 (C.A. 8), certiorari denied, 371 U.S. 818. Petitioner's experienced trial counsel obviously did not think the challenged remarks were prejudicial at the time they were made, since he made no objection. Government counsel did not state that Mr. Simpson would have contradicted petitioner's testimony that he and Mr. Simpson had flown to Nashville in an unsuc-

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[2] The attorney-client privilege would not necessarily have barred all testimony by Simpson as the court of appeals assumed. Conceivably, he might have engaged in activities not subject to the attorney-client privilege.

cessful attempt to find Badger.[3] Even if the jury had gained that impression, this would hardly have been crucial to petitioner's defense. In addition to petitioner's testimony that he could not find Badger (Tr. 234), there was government testimony by an F.B.I. agent that investigation had failed to disclose Badger's whereabouts (Tr. 217-218). The principal weakness of petitioner's case was the patent incredibility of the Badger story. The jury reasonably refused to believe that a man would post, as collateral for a $50 loan, an automobile worth about $2,600 and then disappear without returning to reclaim it.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

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[3] In the context of the government attorney's challenged remarks, any testimony Mr. Simpson might have given on the question as to whether or not he had been dismissed as petitioner's attorney on the previous appeal, would have been on a completely collateral matter not affecting any of petitioner's substantial rights.

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